THE LAW OF INTERROGATION IN NORTH CAROLINA

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Contents

I. Voluntariness

A. Generally. A suspect's statement is voluntary if it is "'the product of an essentially free and unconstrained choice by its maker.'" State v. Wilkerson, 363 N.C. 382, 431 (quoting Culombe v. Connecticut, 367 U.S. 568 (1961)). A suspect's statement is involuntary, or coerced, and therefore inadmissible under the Due Process Clause, when the suspect's "will [is] overborne." Dickerson v. United States, 530 U.S. 428, 434 (2000).

B. Factors. When determining whether a statement is voluntary, a court must consider all relevant circumstances. *Dickerson,* 530 U.S. 428; Withrow v. Williams, 507 U.S. 680, 689 (1993) ("[W]e continue to employ the totality-of-circumstances approach when addressing a claim that the introduction of an involuntary confession has violated due process.").

1. Mental or physical. Coercion may be mental or physical. For example, a threat of violence may be coercive even if unaccompanied by actual violence. Arizona v. Fulminante, 499 U.S. 279, 287 (1991).

2. Personal characteristics. Personal characteristics of the suspect may be relevant. *Id.* at 286 n.2 (stating that the suspect's low intelligence and lack of education tended to "support a finding of coercion").

3. Promises of leniency. Officers' statements regarding possible favorable or unfavorable outcomes of legal proceedings often give rise to claims of coercion. An older Supreme Court case stated that "any direct or implied promises [of leniency], however slight," would render a subsequent confession involuntary. Bram v. United States, 168 U.S. 532, 542-43 (1897). However, the Court rejected this bright-line rule in *Fulminante* making it "difficult to generalize about what officers may and may not do or say," because officers' remarks are just one part of the totality of the circumstances. ROBERT L. FARB, ARREST, SEARCH AND INVESTIGATION IN NORTH CAROLINA 533 (4th ed. 2011). *See also generally*, 2 WAYNE R. LAFAVE, ET AL. CRIMINAL PROCEDURE § 6.2(c) (3d ed. 2007) (summarizing cases). Recent North Carolina cases in this area include State v. Bordeaux, __ N.C. App. __, 701 S.E.2d 272 (2010) (robbery defendant's confession was involuntary, even though *Miranda* warnings were administered, where officers falsely suggested that they were also investigating the defendant for murder, said that "they would speak to the judge or the district attorney requesting leniency" if the defendant confessed, and said that a confession might allow the defendant a chance at a "normal life." *Id*. at 277); State v. Shelly, 181 N.C. App. 196 (2007) (officer's statement to defendant that "a person who cooperates

and shows remorse and is honest . . . has the best chance of getting the most leniency" was a statement of opinion, not a promise, and did not render the defendant's subsequent confession involuntary. *Id.* at 204); and State v. Bailey, 145 N.C. App. 13 (2001) (officers' statement to defendant that things would "go easier" for him and would be "better" if he confessed, and that he would probably get probation if he confessed, were not promises that rendered the defendant's confession involuntary; the officers clearly stated that the prosecutor, not the officers, controlled the disposition of the case).

Factors Tending to Show Voluntariness	Factors Tending to Show Coercion
• Suspect is given *Miranda* warnings • Suspect is not handcuffed or restrained • Suspect initiates contact with officers • Suspect is familiar with law enforcement officers and police investigations • Suspect is intelligent, educated, or has other personal characteristics that would help him resist pressure • Officers summarize evidence truthfully • Officers avoid foul language, shouting, etc.	• Officers physically assault suspect • A large number of officers are present, especially if uniformed and armed • Officers promise leniency, promise to testify for the suspect, etc. • Suspect is questioned while injured or impaired • Suspect is questioned for an unusually long period of time • Suspect is deprived of food, water, or sleep • Suspect is young, of low intelligence, or has other personal characteristics that make him vulnerable to pressure • Suspect is held incommunicado, away from family, friends, and counsel • Officers lie about evidence

C. State action. The Due Process Clause concerns state action. Therefore, coercive police activity is essential to a finding of involuntariness. Colorado v. Connelly, 479 U.S. 157 (1986) (even if psychotic defendant's confession was the product of his mental illness and was therefore not volitional, that alone would not render the confession involuntary under the Due Process Clause).

D. Subsequent statements. When a defendant makes a coerced confession, then makes a later confession that the state contends was voluntary, the court must decide whether the second confession is a product of the first. Oregon v. Elstad, 470 U.S. 298, 310 (1985) ("When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession.").

E. Exclusionary rule. Due process requires the exclusion of involuntary statements, even for impeachment purposes. Mincey v. Arizona, 437 U.S. 385 (1978) ("[*A*]*ny* . . . use [of] a defendant['s] . . . involuntary statement is a denial of due process of law." *Id.* at 398 (emphasis in original)). The exclusion of coerced confessions serves several purposes, including ensuring the reliability of evidence and deterring police misconduct. 2 WAYNE R. LAFAVE, ET AL. CRIMINAL PROCEDURE § 6.2(b) (3d ed. 2007).

II. Fifth Amendment/Self-Incrimination/*Miranda*

A. Generally. "[T]he prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates [that the defendant has been given warnings] effective to secure the [Fifth Amendment] privilege against self-incrimination," and has waived his rights. Miranda v. Arizona, 384 U.S. 436, 445 (1966).

B. Custody. A suspect is in custody when he is placed under arrest or his freedom is curtailed to a degree associated with an arrest. The fact that a suspect is not free to leave does not necessarily mean that he is in custody. Berkemer v. McCarty, 468 U.S. 420 (1984) (holding that an ordinary traffic stop is not custodial). *See also* State v. Buchanan, 353 N.C. 332 (2001) (stating that custody requires an arrest or the functional equivalent).

1. **Personal characteristics**. "[A] child's age properly informs the *Miranda* custody analysis," so long as the child's age is known to police or reasonably apparent. J.D.B. v. North Carolina, __ U.S. __, 131 S. Ct. 2394, 2399 (2011). The extent to which other personal characteristics of the suspect may be considered in determining custody issue is not clear.
2. **Inmates.** A suspect who is serving a prison sentence for an unrelated crime is not in custody simply by virtue of being in prison. Howes v. Fields, __ U.S. __, 132 S. Ct. 1181 (2012); *Cf.* Maryland v. Shatzer, __ U.S. __, 130 S. Ct. 1213 (2010). However, he may be in custody if, for example, he is brought without his consent to an area of the prison where he is required to remain isolated with investigators.

C. Interrogation. Interrogation includes questioning or other conduct that is reasonably likely to elicit an incriminating response from the subject. Rhode Island v. Innis, 446 U.S. 291 (1980) (holding that officers' comments to one another, in front of a suspect, about the risk of a child finding the gun that they believed the suspect had used in a robbery, did not rise to the level of interrogation even if the situation involved "subtle compulsion").

1. **Requests for consent to search**. Requests for consent to search do not constitute interrogation. State v. Cummings, 188 N.C. App. 598 (2008).
2. **Booking questions.** Routine booking questions normally do not constitute interrogation. Pennsylvania v. Muniz, 496 U.S. 582 (1990).
3. **Spontaneous statements.** When a suspect makes a statement spontaneously, or volunteers a statement not in response to interrogation, *Miranda* warnings are not required, even when an officer asks the suspect to clarify or explain his remarks. State v. Porter, 303 N.C. 680 (1981).

D. Warnings. "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda v. Arizona, 384 U.S. 436, 444 (1966). Officers may use any phrasing that conveys the essential meaning of the warnings. Florida v. Powell, __ U.S. __, 130 S. Ct. 1195 (2010).

E. Waiver of Rights. "[F]or a valid waiver of *Miranda* rights, the State must prove, by a preponderance of the evidence, that the defendant waived his rights

voluntarily, knowingly and intelligently." State v. Medina, 205 N.C. App. 683, 686 (2010) (internal citations omitted). A waiver may be oral or written, and may be express or implied. For example, "[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." Berghuis v. Thompkins, __ U.S. __, 130 S. Ct. 2250, 2262 (2010).

F. Assertion of Right to Silence. A suspect may invoke his right to silence "in any manner." *Miranda*, 384 U.S. 436. However, he must do so unambiguously. *Thompkins*, 130 S. Ct. at 2259; *Cf.* Davis v. United States, 512 U.S. 452 (1994) (holding that the right to counsel must be asserted unambiguously). An officer is not required to clarify ambiguous statements such as "I'm not sure I want to talk." *Cf. Davis*, 512 U.S. at 461-62. The fact that a suspect actually remains silent, i.e., does not respond to some or all of an officer's questions, is insufficient to assert his right to silence. *Thompkins*, 130 S. Ct. 2259-60.

G. Assertion of Right to Counsel. A suspect must assert his right to counsel unequivocally. An officer is not required to stop questioning in response to a suspect's ambiguous assertion of his right to counsel, nor to attempt to clarify the suspect's statement. *Davis*, 512 U.S. at 459.

H. Later Questioning

1. After assertion of right to silence. A suspect's assertion of his right to silence must be "scrupulously honored." Michigan v. Mosley, 423 U.S. 96, 104 (1975). This requires the immediate cessation of interrogation. However, an officer may approach the suspect again after a sufficient period of time has passed. There is no bright-line rule about the amount of time required; it may vary depending on whether the officer is the same one who previously interrogated the suspect, whether the officer wants to inquire about the same crime, and other factors. Generally, somewhere from a few hours to a day or so may need to pass. *See generally*,ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 545-46 (4th ed. 2011).

2. After assertion of right to counsel. When a suspect asserts his right to counsel, interrogation must cease and officers may not approach the suspect again, about any crime, so long as he remains in continuous pretrial custody. Edwards v. Arizona, 451 U.S. 477 (1981). If, however, there is a 14-day break in custody, the coercive effect of custody dissipates and officers may approach the suspect again. Maryland v. Shatzer, __ U.S. __, 130 S. Ct. 1213 (2010).

I. Exclusionary Rule. Statements obtained in violation of *Miranda* are inadmissible in the state's case in chief. However, a voluntary statement obtained in violation of *Miranda* may be used to impeach the defendant if he testifies. Harris v. New York, 401 U.S. 222 (1971). When an officer obtains a statement in violation of *Miranda*, then administers *Miranda* warnings and obtains a second statement, the second statement is likely admissible unless the officer was deliberately circumventing *Miranda* by using a two-step interrogation strategy. *Compare* Missouri v. Seibert, 542 U.S. 600 (2004) (second statement inadmissible), *with* Oregon v. Elstad, 470 U.S. 298 (1985) (second statement admissible).

- **Exception for Public Safety Questions.** A statement made in response to custodial interrogation is admissible, notwithstanding the absence of *Miranda* warnings, if the interrogation was based on an officer's objectively reasonable need to protect himself or the public from an immediate danger associated with a weapon. New York v. Quarles, 467 U.S. 649 (1984).

J. Statutory Warnings for Juveniles. Prior to custodial interrogation, juvenile suspects must be advised of the rights listed in G.S. 7B-2101. Those rights are somewhat broader than the *Miranda* warnings, particularly in giving a juvenile suspect the right to have "a parent, guardian, or custodian present during questioning." G.S. 7B-2101(a)(3). However, officers should be careful not to expand the warnings further. *In re* M.L.T.H., 200 N.C. App. 476 (2009) (officer's statement that juvenile could have "anybody" present during questioning was improper under G.S. 7B-2101(a) and could be viewed as an attempt to induce the juvenile to request the presence of someone who would not protect his interests). Additional restrictions apply to the interrogation of juveniles under 14 years of age. G.S. 7B-2101(b).

III. Sixth Amendment Right to Counsel

A. Generally. The Sixth Amendment states that criminal defendants are entitled to the "[a]ssistance of [c]ounsel." The Supreme Court has interpreted this to mean that "once the adversary judicial process has been initiated . . . a defendant [has] the right to have counsel present at all 'critical' stages of the . . . proceedings." Montejo v. Louisiana, 556 U.S. 778, 786 (2009). Questioning by law enforcement is a critical stage. Id. Therefore, a defendant has a Sixth Amendment right to counsel during police questioning after adversary judicial proceedings have begun, whether or not the defendant is in custody.

B. Attachment of Right. The adversary judicial process begins, and so the defendant's right to counsel "attaches," when the defendant is indicted or at his initial appearance before a magistrate, whichever comes first. Rothgery v. Gillespie County, 554 U.S. 191 (2008). (However, the initial appearance is likely not a critical stage, so the defendant need not be represented by counsel during that proceeding.)

C. Offense Specific. A defendant's Sixth Amendment right to counsel is offense specific, meaning that it applies only to questioning about crimes for which the defendant has been indicted or for which he has had an initial appearance. Officers may question a defendant about other crimes, even closely related crimes – but not greater or lesser-included offenses – without running afoul of the Sixth Amendment. Texas v. Cobb, 532 U.S. 167 (2001); McNeil v. Wisconsin, 501 U.S. 171 (1991).

D. Informants and Undercover Officers. A defendant's Sixth Amendment right applies during any questioning by officers or others acting on their behalf, even if the defendant is unaware that he is speaking to an agent of the state. Therefore, when an informant acts at an officer's behest and deliberately elicits information from a defendant, a Sixth Amendment violation takes place. By contrast, an informant may properly act as a passive "listening post." The same rules apply to undercover officers. No Sixth Amendment violation occurs when a private person

deliberately elicits information from a defendant on his own initiative – as an "entrepreneur" rather than as an agent of law enforcement – even if the person subsequently provides the information to the police. *See generally* ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 553-57, 652-54 (4th ed. 2011).

E. Waiver of Right. "[T]he Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled." Montejo v. Louisiana, 556 U.S. 778, 786 (2009) (internal citations omitted). A *Miranda* waiver is generally sufficient also to waive a defendant's Sixth Amendment rights. *Id.*

F. Assertion of Right. No Supreme Court or North Carolina authority addresses whether a defendant's assertion of his Sixth Amendment right must be unambiguous, as an assertion of *Miranda* rights must be under *Davis v. United States*, 512 U.S. 452 (1994). Cases elsewhere suggest that it must be. *See, e.g.*, State v. Forbush, 796 N.W.2d 741 (Wis. 2011); State v. Burke, 181 P.3d 1, 11 (Wash. 2008) ("The invocation of the Sixth Amendment right to counsel requires an unambiguous request for counsel."). A defendant's in-court request for counsel is not an assertion of the defendant's Sixth Amendment right to counsel. *Montejo*, 556 U.S. 778.

G. Later Questioning. After *Montejo*, it is not clear whether officers may approach, a second time, a defendant who has once asserted his Sixth Amendment rights. However, if the defendant initiates contact with the officers and waives his Sixth Amendment rights, it is clearly permissible for the officers to question the defendant.

H. Exclusionary Rule. Statements obtained in violation of a defendant's Sixth Amendment right to counsel are inadmissible in the state's case in chief. If voluntary, however, they may be admitted to impeach any inconsistent testimony by the defendant. Kansas v. Ventris, 556 U.S. 586 (2009).

IV. Statutory Recording Requirements

A. Requirement. For offenses committed on or after December 1, 2011, the following must be recorded under G.S. 15A-211 (a previous version of the statute applied to homicide investigations only):

1. All custodial interrogations of juveniles conducted at a place of detention. G.S. 15A-211(d).

2. All custodial interrogations conducted at a place of detention that are related to any "Class A, B1, or B2 felony, and any Class C felony of rape, sex offense, or assault with a deadly weapon with intent to kill inflicting serious injury." *Id.*

B. Remedy. Subsection (f) of the statute sets out remedies for noncompliance with the recording requirements. It provides, inter alia, that "[f]ailure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress." Whether this means that suppression may be

based on noncompliance, or simply that noncompliance is relevant to, e.g., voluntariness, is not clear.